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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Appellant,

v.

KENNETH RAY MITCHELL,

Defendant and Respondent.

C062110

(Super. Ct. Nos.
CRF075879, CRF074569)

Defendant Kenneth Ray Mitchell entered a plea of no contest to all counts and admitted all enhancements in case Nos. CRF075879 and CRF074569 in exchange for an indicated sentence of five years eight months and a commitment to the California Rehabilitation Center (CRC). (Welf. & Inst. Code, § 3051.) The court imposed sentence accordingly and then suspended execution, committing defendant to CRC.

The People appeal in both cases. (Pen. Code, § 1238, subd. (a)(5), (8), (10); Cal. Rules of court, rule 8.304(a), (b).) The People contend that the court imposed an unlawful

sentence, requiring remand for resentencing. The People acknowledge that defendant's sentence is "stayed given his referral to CRC" but claim the issue of his unlawful sentence is ripe for review because CRC commitment was not permissible for defendant, whose sentence length should have been, at a minimum, six years eight months, which exceeds the six-year limitation for CRC.¹ The People state that even though the prosecutor never objected to the sentence as unlawful, the prosecutor did not concur in the plea agreement. The People rely upon the proposition that an unlawful sentence may be challenged at any time, citing *People v. Scott* (1994) 9 Cal.4th 331, 354. The People also contend the trial court engaged in illegal judicial plea bargaining.

As defendant recognizes, the People may appeal and claim an unlawful sentence was imposed. (*People v. Trausch* (1995) 36 Cal.App.4th 1239, 1243, fn. 5.) We will remand for resentencing. We reject the People's claim that the court engaged in illegal plea bargaining.

¹ Welfare and Institutions Code section 3052, subdivision (a)(2) provides, in relevant part, as follows:

"(a) Sections 3050 and 3051 shall not apply to any of the following:

"

"(2) . . . [P]ersons whose conviction results in a sentence which, in the aggregate, exclusive of any credit that may be earned pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code, exceeds six years' imprisonment in state prison"

Background

The two cases against defendant were filed in 2007. On November 5, 2008, newly retained counsel Kelly Tanalepy sought to resolve the old cases, filing a lengthy request for CRC placement, recounting defendant's background and attaching numerous letters from family, friends, counselors, and employers.

The minutes of March 3, 2009, reflect that the court indicated a sentence of five years eight months and CRC commitment if defendant entered a plea to the "sheet" in both cases.

On April 17, 2009, defendant entered a plea of no contest to all counts and admitted all enhancements in both informations. On the plea forms, defendant stated his understanding that the indicated sentence, which is recounted in detail, totaled five years eight months, and that he would be referred to CRC. The prosecutor noted on the plea forms that she did not concur in the plea agreement. At the entry of plea hearing, defense counsel stated that the prosecutor did not concur in the plea agreement. The prosecutor stated the factual basis for defendant's plea and waived preparation of an additional probation report. The prosecutor did not claim the intended or indicated sentence was wrong.

At sentencing, the court imposed the sentence that had been recounted on the plea forms as follows (the potential punishment for each offense and enhancement is noted in brackets for comparison purposes):

In case No. CRF074569:

Count 1, possession of methamphetamine for sale (Health & Saf. Code, § 11378), the upper term of three years [16 months, 2 years, 3 years];

Count 2, maintaining a drug house (Health & Saf. Code, § 11366), stayed pursuant to Penal Code section 654 [16 months, 2 years, 3 years];

Count 3, possession of drug paraphernalia, a misdemeanor (Health & Saf. Code, § 11364, subd. (a)), a concurrent 120-day jail term [\$30 to \$500 fine and/or 15 to 180 days in county jail (Health & Saf. Code, § 11374)];

Count 4, possession of a hypodermic needle, a misdemeanor (Bus. & Prof. Code, § 4140), a concurrent 120-day jail term [\$200 to \$2,000 fine and/or 30 days to 6 months (Bus. & Prof. Code, § 4321)];

Count 5, unlawful use or being under the influence of methamphetamine, a misdemeanor (Health & Saf. Code, § 11550, subd. (a)), a concurrent 120-day jail term [90 days to one year in county jail];

Two prior drug convictions (Health & Saf. Code, § 11370.2, subd. (c)), concurrent three-year term each [full, separate, consecutive three-year term each];

On-bail enhancement (Pen. Code, § 12022.1, subd. (b)), consecutive two-year term [consecutive two-year term]; and

Prior prison term (Pen. Code, § 667.5, subd. (b)), concurrent one-year term [consecutive one-year term].²

In case No. CRF075879:

Count 1, second degree burglary (Pen. Code, § 459), a consecutive one-third the midterm or eight months [16 months, 2 years, 3 years];

Count 2, receiving stolen property (Pen. Code, § 496, subd. (a)), stayed pursuant to Penal Code section 654 [16 months, 2 years, 3 years];

Count 3, fraudulent use of an access card, a misdemeanor (Pen. Code, § 484g), concurrent 120-day jail term [up to \$1,000 fine and/or up to six months in county jail];

Two on-bail enhancements (Pen. Code, § 12022.1, subd. (b)), concurrent two-year term for one, Penal Code section 654 stay on the other [consecutive two-year term each]; and

Prior prison term (Pen. Code, § 667.5, subd. (b)), concurrent one-year term [consecutive one-year term].

The prosecutor noted that she had been ordered to file the petition for commitment to CRC and did not concur "due to the fact that these are concurrent to the sentencing to CDC [sic]." The court determined that defendant was a narcotics addict and committed him to CRC.

² The reporter's transcript reflects first an eight-month term, concurrent, then a one-year term, concurrent, for the prior prison term. Because the plea form and the minutes reflect a one-year term, concurrent, we will interpret the reporter's transcript as reflecting that the court corrected itself.

Analysis

Unlawful Sentence

The People contend that the court ignored mandatory consecutive sentencing.

Health and Safety Code section 11370.2, subdivision (c) provides:

"(c) Any person convicted of a violation of, or of a conspiracy to violate, Section 11378 or 11379 with respect to any substance containing a controlled substance specified in paragraph (1) or (2) of subdivision (d) of Section 11055 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment."

Here, the court imposed three years for each of the two prior drug convictions but ordered the enhancements to run concurrently with each other and concurrently with the sentence on count 1. The court was required to impose consecutive three-year terms or strike the enhancements.

Penal Code section 12022.1, subdivision (b) provides:

"(b) Any person arrested for a secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison which

shall be served consecutive to any other term imposed by the court."

Here, in case No. CRF074569, the court imposed a consecutive two-year term for the on-bail enhancement, but in case No. CRF075879, the court imposed a concurrent two-year term for one and a Penal Code section 654 stay on the other on-bail enhancement. The court was required to impose consecutive two-year terms or strike the enhancements.

Penal Code section 667.5, subdivision (b) provides:

"(b) Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction."

In case No. CRF074569, the court imposed a concurrent one-year term for the prior prison term and the same for the prior prison term in case No. CRF075879. The court was required to impose a consecutive one-year term for each or strike the enhancements.

The People contend that the matter should be remanded to the trial court for resentencing. Defendant responds that the remedy is to remand to allow the trial court an opportunity to exercise its discretion to strike the enhancements in the

interest of justice. (Pen. Code, § 1385; *People v. Rivas* (2004) 119 Cal.App.4th 565, 571; *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1568-1569.) The People reply that the trial court already exercised its discretion by imposing the enhancements, and the error in sentencing was that the court failed to impose the enhancements consecutively as mandated. We agree with defendant.

The trial court has discretion to dismiss enhancements under Penal Code section 1385 in the "furtherance of justice," but the court must consider the defendant's constitutional rights "and the interests of society represented by the People." (*People v. Orin* (1975) 13 Cal.3d 937, 945 (*Orin*), italics omitted.) "At the very least, the reason for dismissal must be 'that which would motivate a reasonable judge.' [Citations.]" (*Id.* at pp. 945-946.)

The court sentenced defendant in a manner to ensure that he would not be disqualified from CRC. We will remand to allow the court an opportunity to consider whether to strike the enhancements, discretion which it has yet to exercise. A statement of reasons is required for any enhancement stricken. (Pen. Code, § 1385, subd. (a).) If the court chooses not to strike the enhancements, defendant shall have an opportunity to withdraw his plea since CRC was the primary motivation for his plea and the court's indicated sentence.

Plea Bargaining

The People claim that the trial court's indicated sentence if defendant entered a plea to the sheets constituted an illegal plea bargain. We reject this claim.

"The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged.

[Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment [citation], by the People's acceptance of a plea to a lesser offense than that charged, either in degree [citations] or kind [citation], or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of 'bargaining' between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them.

[Citation.] [¶] However, the court has no authority to substitute itself as the representative of the People in the

negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter. [Citation.]" (Orin, *supra*, 13 Cal.3d at pp. 942-943, fns. omitted.)

"[W]here the defendant pleads guilty to all charges, all that remains is the pronouncement of judgment and sentencing; there is no requirement that the People consent to a guilty plea. [Citations.] In that situation, the trial court may give an 'indicated sentence' which falls within the 'boundaries of the court's inherent sentencing powers.' [Citation.]" (People v. Vessell (1995) 36 Cal.App.4th 285, 296.)

Here, we find no error. A preplea report had been prepared by the probation officer about a year before defendant entered his plea. Defendant pled no contest to all the charges and admitted all the enhancements. The prosecutor stated a factual basis for defendant's plea. Both the prosecutor and defendant waived preparation of an additional probation report. The court indicated a sentence of five years eight months. The prosecutor did not concur in the plea agreement. All that remained was sentencing, and the court's indicated sentence fell within the

boundaries of its inherent sentencing powers. The facts that no additional presentence probation report was ordered and the indicated sentence was not predicated on further factual findings did not transform the understanding into an illegal plea bargain.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for resentencing. If the court chooses to strike the enhancements, it shall state reasons for doing so. If the court does not strike the enhancements, defendant must be given the opportunity to withdraw his plea.

RAYE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.